



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

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Jeffrey W. Brennan
Assistant Director
Health Care Services & Products
Direct Dial
(202) 326-3688

January 6, 2004

Judy Erb
Vice President
Dunlap Memorial Hospital
832 South Main Street
Orrville, Ohio 44667

Dear Ms. Erb:

This letter responds to your request on behalf of Dunlap Memorial Hospital for an advisory opinion whether Dunlap's provision of pharmaceuticals to the Viola Startzman Free Clinic would fall within the scope of the Non-Profit Institutions Act (NPIA). The NPIA exempts from the Robinson-Patman Act "purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."¹ For the reasons explained below, we have concluded the NPIA would apply to pharmaceuticals transferred by Dunlap to the Free Clinic.

As we understand the facts based on the information you provided, Dunlap is a non-profit hospital. The Free Clinic is a non-profit institution, funded entirely by donations, grants, and unpaid services of volunteer physicians, that provides free medical care to adults in and around Wayne County, Ohio. Dunlap purchases pharmaceuticals through Amerinet, a hospital purchasing group. The hospital pays a lower price than is currently available to the Free Clinic, which purchases drugs prescribed by Clinic doctors from a local pharmacy at the average wholesale price plus a dispensing fee. You have asked whether the NPIA would apply to drugs purchased by Dunlap and then transferred to the Free Clinic, where they would be dispensed to patients of the Clinic. You also ask whether Dunlap could charge a fee to cover its cost of providing the pharmaceuticals to the clinic.

The NPIA applies only to pharmaceuticals purchased by a hospital for its "own use" – that

¹ 15 U.S.C. § 13c.

is, for use in the care the hospital renders to its patients.² Since the patients of the Free Clinic are not Dunlap's patients, the NPIA would not apply to pharmaceuticals dispensed directly by the hospital to those individuals. The Commission, however, has concluded that the Act covers the transfer of supplies, at cost, from a non-profit hospital to another organization that is entitled to NPIA protection for its own purchases, so long as those supplies are for the receiving institution's "own use" within the meaning of the NPIA.³

The Free Clinic appears to be a non-profit charitable institution entitled to purchase supplies under the NPIA, and it will use the pharmaceuticals that it receives from Dunlap for its "own use" in the care of Clinic patients. Accordingly, Dunlap's purchase of pharmaceuticals for transfer to the Free Clinic at its cost would be covered by the NPIA.

The Commission's reasoning in the *St. Peter's* opinion would not apply if Dunlap sold pharmaceuticals to the Free Clinic at a profit. The Commission's staff has concluded, however, that an institution making a transfer to another NPIA-eligible institution may charge the receiving institution not only its acquisition cost for the materials but also a fee sufficient to cover any additional costs it incurs as a direct result of making the transfer (but not overhead expenses that the institution would incur without regard to the transfer).⁴ Dunlap will retain the protection of the NPIA, therefore, if it transfers pharmaceuticals to the Free Clinic at a price that does not exceed its direct costs in purchasing and transferring the materials.

This letter sets out the views of the staff of the Bureau of Competition, as authorized by the Commission's Rules of Practice. Under Commission Rule § 1.3(c), 16 C.F.R. § 1.3(c), the Commission is not bound by this staff opinion and reserves the right to rescind it at a later time. In addition, this office retains the right to reconsider the questions involved and, with notice to the requesting party, to rescind or revoke the opinion if implementation of the proposed program results in substantial anticompetitive effects, if the program is used for improper purposes, if facts change significantly, or if it would be in the public interest to do so.

Sincerely yours,

Jeffrey W. Brennan
Assistant Director

² *Abbott Laboratories v. Portland Retail Druggists Assn*, 425 U.S. 1, 14 (1976).

³ *St. Peter's Hospital of the City of Albany*, 92 F.T.C. 1037 (1978).

⁴ Letter from Michael D. McNeely to Sheldon Klein (*North Ottawa Community Hospital*) (October 22, 1996).